IN THE UNITED STATES PATENT AND TRADEMAR OFFICE
BEORE THE TRADEMARK TRIAL AND APPEAL BOARD

74/172,354

FRESH EXPRESS INCORPORATED,	)	
	)	
Petitioner,	)	Cancellation No. 92047162
	)	Reg. No. 1,758,520
v.	)	
	)	Issued March 16, 1993
SUPREME OIL COMPANY,	)	Mark: SALAD BAR
	)	
Respondent.	)	

REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT WITH SUPPORTING MEMORANDUM

I. Introduction

Registrant Supreme Oil Company ("Supreme" or "Registrant") hereby opposes Petitioner Fresh Express Incorporated's ("Fresh Express" or Petitioner") Motion for Summary Judgment based on Petitioner's allegations that through allegedly deemed admissions Registrant has abandoned its registered trademark for SALAD BAR, Reg. No. 1,758,520, which is the subject of this cancellation proceeding. Petitioner's entire basis for this Motion is predicated upon Registrant's alleged failure to respond to Petitioner's Requests for Admission and other discovery requests. However, this cannot possibly be factually true as several documented facts demonstrate Petitioner's tacit and explicit approval for informal discovery responses and repeated suspension of discovery cutoff dates, including of responses to Requests for Admission, all of which leads to an abundance of prevailing factual issues in this case showing the inappropriate nature of Petitioner's Motion for Summary Judgment. What is abundantly clear is that the parties had agreed to first engage in informal discovery and settlement efforts in advance of providing formal discovery responses. Based upon the record in these proceedings, and the

written communications between the parties, it cannot credibly be disputed that the parties had an agreement for informal discovery and that while previously extending time periods they held formal discovery in abeyance, pending the disposition of settlement efforts. Petitioner's counsel cannot point to any Motion to Compel, or even any letter where Petitioner requested responses to Interrogatories, Requests for Documents or Requests for Admissions. Petitioner cannot point to any due date ever being set for when responses to any of the outstanding discovery would have become due, or precisely when Petitioner called an end to the informal discovery agreement. Instead at some unstated point it appears that Petitioner, perhaps unhappy with the status of settlement talks, instead sought to claim that responses to discovery were earlier due or past due and instead proceeded under the present Motion with the contention that the Petitioner was in default, while otherwise shutting the Respondent out of discovery from Petitioner.

In essence, Petitioner has now sought to ignore its prior factual representations of conducting informal discovery, including responses and suspension agreements, and seeks to ambush Registrant with this Motion, which as shown herein, is not appropriate due to the plethora of factual issues yet to be resolved as to allegations of abandonment of Registrant's long registered and quite valuable SALAD BAR mark and registration.

II. Registrant has never admitted to any facts as to abandonment of any of its registrations, and Petitioner's Requests for Admission were withdrawn or suspended along with its discovery to be conducted on an informal basis by Petitioner's own request and agreement.

In its Motion, Petitioner essentially bases all of its allegations of Registrant's abandonment of its SALAD BAR mark on its factually incorrect and highly disputed assertions of Respondent's alleged failure "to produce any competent evidence that it has ever used the mark SALAD BAR ("Respondent's Mark") let alone evidence that refutes abandonment of the mark". (See Petitioner's Memorandum, page 1, penultimate line through page 2). Thus,

Petitioner alleges that these are "[t]he undisputed facts of this case" as being "Respondent's own admissions". Petitioner is wrong, and factually incorrect, and is trying to ambush Registrant by way of its very own factually incorrect representations.

Petitioner further alleges the factually disputed background of this case to be tortuous and as "having gone on for too long without progress." As shown herein below, this is of Petitioner's own insistence and own doing, clearly showing the inappropriate nature of Petitioner's Motion.

1. Record e-mails between counsel for the parties show unequivocally that Petitioner's statements in its Memorandum allegedly supporting Summary Judgment are incorrect.

The record shows that Petitioner's First set of Interrogatories, Requests for Production of Documents, and Requests for Admission were all served on Registrant on September 10, 2007, which would have been originally due for responses on October 15, 2007. As a factual matter, on this same day that Petitioner served its discovery requests on Registrant, Petitioner also requested a stipulation to a 60-day extension of the discovery period. See, e-mail of September 10, 2007, Exhibit 1. By way of a September 12, 2007 e-mail, Registrant agreed. Exhibit 2. See also Exhibit 3, an e-mail of September 17, 2007 in which Petitioner sent Registrant a stipulated Motion to extend discovery cutoff. Further, directly contrary to Petitioner's assertions of fact in its Memorandum, and quite soon after its Requests for Admission were served, Petitioner by another email on September 18, 2007 next requested *that in addition to extending the discovery cutoff date, Petitioner now informed Registrant that discovery, including Requests for Admission, could be conducted by an "informal exchange of information,"* while seeking a possible "resolution" (See Exhibit 4), thus extending indefinitely the due date for discovery responses.

As noted in Lynn Perry's Declaration ¶ 18, Respondent's counsel agreed to the proposed informal discovery.

Thereafter, as acknowledged in Petitioner's Memorandum, Respondent orally requested an extension of time to respond to Petitioner's discovery requests, which was granted on November 14, 2007. This is undisputed. However, Petitioner thereafter factually, incorrectly represents that, "I do not believe that Respondent's counsel ever asked for another extension." However, Petitioner did, in fact, thereafter agree to additional informal discovery, discovery extensions and to suspend proceedings pending settlement discussions.

As shown in Exhibit 5, an e-mail dated November 1, 2007, Petitioner again requested another 60 day extension for discovery to close on January 16, 2008, and to discuss settlement, while not mentioning anything as to its due dates for Requests for Admission, and which Registrant agreed to by e-mail on the same date.

Thereafter, as shown by Exhibit 6, Registrant requested an additional 60-day extension of discovery by e-mail of December 28, 2007, to March 17, 2008, which was indeed consented to by Petitioner via an e-mail of January 2, 2008. See Exhibit 7 ("Happy New Year, Amanda! Yes, we will consent..."). Thus, as of this date, responses to discovery requests were agreed by the parties to be extended yet again for an additional 60 days, with Petitioner again remaining silent as to any due dates for responses to Requests for Admission indicating again its informal discovery agreement, a position directly inconsistent with Petitioner's statements in its Memorandum.

While discovery extensions were ongoing, further email correspondence shows the parties' ongoing settlement discussions as well. For example, an e-mail of February 4, 2008 acknowledged a telephone conversation of January 15, 2008 is from Petitioner to Registrant

proposing terms of settlement. See Exhibit 8. Here, Petitioner again makes no mention of due dates for answers to Requests for Admission, which by agreement of the parties, had been agreed to be conducted on an informal basis with the discovery cutoff date extended.

Registrant acknowledged and responded by e-mail of February 6, 2008 to pass along the settlement offer. See Exhibit 9. Furthermore, as shown by a February 6, and 7, 2008 e-mails, evidence of use of Registrant's SALAD BAR mark was in fact forwarded to Petitioner who in fact acknowledged receipt thereof. See Exhibits 10 and 11. This directly refutes Petitioner's misstatements of Registrant's purported admission of abandonment of its mark. While Petitioner contends that this evidence of use of Registrant's SALAD BAR mark did not appear to its liking, this was and is evidence of use of its SALAD BAR mark nevertheless. This directly factually contradicts Petitioner's false statements of admissions by Registrant of non-use. That this is not contested as evidence of use is telling by the fact that Petitioner in its cancellation petition and this Motion for Summary Judgment has not made a single allegation of fraud against Registrant with respect to use of its SALAD BAR mark. Petitioner simply did not like the evidence of use it did in fact receive, and now contends factually incorrectly that Registrant has abandoned its SALAD BAR mark by non-use. Petitioner also provides its unilateral and wholly unsupported proclamation, in yet another factually incorrect statement, that according to someone who may have once worked at Supreme Oil, a "senior sales representative...stated that Supreme Oil had no intention of producing a product under the brand name 'Salad Bar.'" (Pet. Mem. P. 3, referring Brooks Decl. ¶ 16). However, such self-serving statement of Registrant's purported lack of "intention" is directly contradicted by Petitioner's acknowledged receipt from Registrant of evidence of use of its SALAD BAR mark.

Proceedings in this cancellation were suspended by TTAB Order of March 18, 2008 through April 16, 2008. As set forth in this Order, the parties to this proceeding were allowed thirty (30) days from resumption in which to serve discovery responses. This Order was a result of a Motion to Suspend for Settlement with Consent filed March 17, 2008 – a Stipulated Consent Motion by both parties – setting forth as a discovery Closure date August 15, 2008.

Petitioner thereafter apparently had a change of heart about its Stipulated Motion and Agreement, and on March 18, 2008, the same day of the stipulated motion, filed yet another Motion to Reopen this proceeding, stating now that in contrast to its Stipulated Motion to Suspend, it only agreed to a lesser suspension time, and further, despite its prior explicit affirmations to conduct informal discovery with no particular due dates for responses, and to repeatedly extend discovery cutoff dates, Petitioner now announced that "objections are waived and the Requests for Admission are deemed admitted", a position directly contradictory to its Stipulated Motion and wholly inconsistent with its earlier representations. More particularly, in an e-mail dated March 18, 2008 from Petitioner to Registrant, Exhibit 12, Petitioner contends with feigned surprise as to the stipulated Motion by the parties as to a suspension. In filing its Motion to Reopen, *for the first time*, as undisputedly shown by prior e-mail exhibits, Petitioner now takes the wholly inconsistent motion that it had not granted any extensions to answer outstanding discovery requests, but only extension to a discovery deadline, which, as shown by e-mail documents described above, is simply is not true. In Petitioner's Motion, it was also falsely represented that Respondent "has taken no discovery" during the time "[d]iscovery has been open nearly a year in this case". As shown above, during this "year" of discovery, Petitioner has itself requested, and received, informal discovery, has itself extended discovery by months at a time, including discovery response dates; and has never once attempted to change its

self-initiated agreement of informal discovery by requesting answers to its Requests for Admission and other discovery requests. When in the final days of the discovery time period it became unclear to Respondent whether Petitioner would consent to a further extension or suspension to preserve the record the Respondent served some discovery. In fact, Petitioner misrepresents to this Board that Registrant "has taken no discovery", since Registrant has in fact served discovery on Petitioner, which in accord with its own informal discovery agreement with Registrant, the Petitioner never turned over requested documents and only non-substantively ever responded to the entire set of Interrogatories with an objection, with matters still appearing to Respondent by this that informal discovery would still precede substantive responses.

There are, therefore, several substantial factual issues in this proceeding as to whether Petitioner agreed to conduct discovery informally and to extend the time for responses to its discovery requests, including Requests for Admission, contrary to assertions in its Motion to Reopen and its misstatements made in its Motion. As shown therein, *both* its actions and statements in this proceeding do in fact show that Petitioner did agree to suspend and extend discovery responses pending settlement, and *only when* presented with evidence of use of Registrant's SALAD BAR mark, did Petitioner take an inconsistent position in trying to find a specious way to attempt to show abandonment of Registrant's mark, where in fact there is no abandonment shown.

By Petitioner stipulating to its earlier suspension of proceedings on its own initiative, while saying nothing of its expectation of receiving Registrant's answers to its Requests for Admission in view of its earlier request for informal discovery while settlement was ongoing, Petitioner in fact agreed to suspend Registrant's time for response. Petitioner should not now, to Registrant's prejudice, be allowed to ambush Registrant with its contrary position on the

unanswered discovery, or specifically on the Requests for Admission as being allegedly deemed admitted.

III. The Board has found Summary Judgment improper in view of later filed responses to Requests for Admission.

In *Giersch v. Scripps Networks, Inc.*, 85 USPQ.2d 1306 (TTAB 2007), this Board granted a Respondent's request for purported admissions to be withdrawn and to accept late served responses, which eviscerated a Petitioner's Motion for Summary Judgment. In strikingly similar manner to the present facts, in *Scripps*, the parties had agreed to multiple extensions of time for Respondent Scripps' responses to Petitioner's Requests for Admissions. *Id.* Scripps was then led to believe, or otherwise mistakenly assumed (no doubt based on Respondent's actions), that an additional extension was agreed to when the Petitioner was out of town, but Petitioner instead thereafter advanced that its Requests for Admission were admitted, and filed for Summary Judgment. *Id.*

While not finding excusable neglect, the TTAB did look at circumstances permitting Respondent to withdraw purportedly effective admissions and to substitute responses which rendered Summary Judgment inappropriate. *Id.* As the Board explained:

> **Under Rule 36(b) the Board may permit withdrawal or amendment of admissions where "the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.** ***The notes of the Advisory Committee state that Rule 36(b) emphasizes the importance of having the action decided on the merits...***(emphasis added)

Id. at 1308.

As discretionary with the Board, "the test for withdrawal or amendment of admissions is based on two prongs,

> **(1) the first prong of the test is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case...(a court may permit a party to rescind admissions when doing so better serves the presentation of the merits of the case)**
> **(and)**
> (2) **Under the second prong, the court must examine whether withdrawal (or amendment) will prejudice the party that has obtained the admissions.'"**
> (citations omitted)

Id.

Additionally, as the *Scripps* Board made clear, "'prejudice' is not simply that a party who initially obtained the admission will now have to convince the fact finder of its truth, or that the burden of addressing the merits does not establish "prejudice", but only "special difficulties", such as the unavailability of key witnesses in light of the delay." *Id.*

Courts have held that they must abide by the two-part test of Rule 36(b). See *Perez v. Miami-Dade County*, 297 F.3d 1255, 1265 (11th Cir. 2002), holding that it is an abuse of discretion under Rule 36(b) in denying a motion to withdraw or amend admissions when some other criterion beyond the two-part test is applied, or the test itself is grossly misapplied, citing *Gutting v. FalsStaff Brening Corp.*, 710 F.2d 1309, 1313 (8th Cir. 1983) ("Regardless of the intentions of the district court to sanction [the party], we find the district erred in not considering the factors set out in [R]ule 36(b)").

Applying the two-point test mandated by Rule 36(b) herein shows that withdrawal on amendment of admissions is not only appropriate, but necessary. Here, we have a situation where from informal discovery provided to Petitioner, the Petitioner itself already knew from documents and specimens that admissions directed to abandonment were from any practical standpoint to be considered as denied and no person in receipt of such documents could reasonably conclude otherwise. Furthermore, Respondent's Answer to the Cancellation Petition had already denied all allegations of abandonment.

As similarly found in *Scripps*, with respect to the first prong of the test, the Board should find that the merits of this proceeding will be subserved by allowing withdrawal of any deemed admissions which resulted from Registrant's failure to respond to Petitioner's Requests for Admission, albeit thought to have been suspended by Petitioner's representations and actions of requesting informal discovery and repeatedly extended cutoff dates, and perhaps mistakenly so. Additionally, in *Scripps*, the Respondent submitted a response to Petitioner's requests denying many of the previously admitted facts, demonstrating to the court that supposedly admitted matters were actually disputed. In similar manner herein, Registrant served on Petitioner, acknowledged by factual evidence, documents showing actual use of Registrant's SALAD BAR mark, demonstrating that any supposed admissions of abandonment for non-use are actually disputed. Also as in *Scripps*, if withdrawal of Registrant's supposed admissions herein were not permitted Registrant would be held to have admitted critical elements of Petitioner's asserted claims, which was shown to have satisfied the first prong of the *Scripps* test.

Similar to the Board's finding in *Scripps*, with respect to the second prong of the test, Petitioner herein will not be prejudiced by allowing withdrawal of any deemed Requests for Admission and the replacement thereof with later-served responses. Petitioner has pointed to no particular evidence in the form of special difficulties it may potentially face caused by the need to obtain evidence, and mere inconvenience or any perceived inconvenience is not such evidence. See *Id. at 1309*, citing *FDIC v. Prusia*, 18 F.3d 637 (8th Cir. 1994) (holding that the "mere fact that a party may have prepared a Summary Judgment motion in reliance on an opposing party's erroneous admission does not constitute 'prejudice' such as will preclude grant of a motion to withdraw admissions."). Any potential or perceived prejudice can easily be mitigated by discovery extension, as necessitated to permit the Petitioner to take any additional

discovery based on Registrant's answers to Requests for Admission, and as shown by Petitioner's own multiple requests for informal discovery and discovery cutoff extensions throughout this case.

Thus, as in *Scripps*, based on the Board's two-prong analysis and taking into account all the factual circumstances shown herein, including Petitioner's factual misstatements and ignoring of its own requests for informal discovery, the Board is respectfully requested to exercise discretion pursuant to Rule 36(b) to withdraw any effective admissions of Registrant, and to accept later-served responses; that Petitioner having based its assertion that there are no genuine issues of material fact on Registrant's purported effective admissions, which should now be withdrawn, and for the abundance of other factual issues herein, Petitioner's Motion for Summary Judgment should be denied. Under the circumstances herein it now appears that Respondent itself would now need to proceed with receiving substantive responses to Respondent's own set of Interrogatories previously served upon Petitioner, as well as the document production which Petitioner itself has not yet provided to Registrant. Under the circumstances, it is requested that proceedings be reset with each party to provide substantive responses to outstanding discovery adequately in advance of the open of the testimony periods, and so as to even allow for Respondent (or Petitioner) to file a Motion should substantive responses to outstanding discovery not be sufficiently provided.

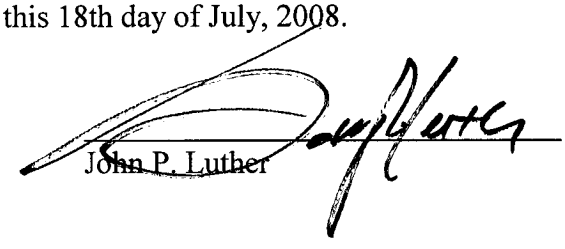
Respectfully Submitted,

By: _____
One of Registrant's Attorneys

Burton S. Ehrlich
John P. Luther
Ladas & Parry LLP
224 South Michigan Avenue, Suite 1600
Chicago, Illinois 60604
(312) 427-1300

CERTIFICATE OF MAILING

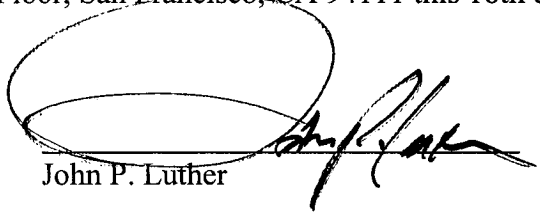
I hereby certify that this paper is being deposited with the United States Postal Service on the date shown below with sufficient postage as First Class Mail in an envelope addressed to Box TTAB NO FEE; Assistant Commissioner for Trademarks, U.S. Trademark Office, P.O. Box 1451, Alexandria, VA 22313-1451 on this 18th day of July, 2008.



John P. Luther

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT WITH SUPPORTING MEMORANDUM was deposited with the United States Postal Service on the date shown below with sufficient postage as First Class Mail in an envelope addressed to E. Lynn Perry, Perry IP Group ALC, 4 Embarcadero Center, 39th Floor, San Francisco, CA 94111 this 18th day of July, 2008.



John P. Luther

EXHIBIT 1

Roach, Amanda

From: Lynn Perry [lperry@perryip.com]
Sent: Monday, September 10, 2007 7:06 PM
To: amanda.roach@ladas.net
Subject: Fresh Express v. Supreme Oil Co. Reg. No. 1758520
Importance: High

Our File 4634-165.1

Dear Ms. Roach,

I am writing to ask your stipulation for a 60 day extension of the discovery period which is currently set to close **September 18,** and to see whether your client would be amenable to discussing a possible resolution. Please let me know. Thank you.

Regards,
E. Lynn Perry
Perry IP Group A.L.C.
4 Embarcadero Center - 39th Floor
San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

EXHIBIT 2

Roach, Amanda

From: Roach, Amanda
Sent: Wednesday, September 12, 2007 5:13 PM
To: 'Lynn Perry'
Subject: RE: Fresh Express v. Supreme Oil Co. Reg. No. 1758520
Importance: High

Dear Ms. Perry:

My client agrees to the extension of discovery. Please send me a draft of the stipulation for review.

Yours sincerely,

Amanda M. Roach
Ladas & Parry LLP
224 South Michigan Avenue
Suite 1600
Chicago, Illinois 60604
(PH) 312-427-1300
(FX) 312-427-6663
(EM) amanda.roach@ladas.net
(WB) www.ladas.com

-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Monday, September 10, 2007 7:06 PM
To: amanda.roach@ladas.net
Subject: Fresh Express v. Supreme Oil Co. Reg. No. 1758520
Importance: High

Our File 4634-165.1

Dear Ms. Roach,

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San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

EXHIBIT
3

Roach, Amanda

From: Roach, Amanda
Sent: Tuesday, September 18, 2007 10:35 AM
To: 'Lynn Perry'
Subject: RE: Amended Petition to Cancel

Dear Ms. Perry,

Thank you for your letter of yesterday with attachments. The motion to extend the discovery cut-off is acceptable, therefore please feel free to file it. I will review the amended petition to cancel and run the change by my client, though I don't see it as being a problem. I will get back to you on that as soon as possible on that point. Let me know if you have any questions.

Yours sincerely,

Amanda

Amanda M. Roach
Ladas & Parry LLP
224 South Michigan Avenue
Suite 1600
Chicago, Illinois 60604
(PH) 312-427-1300
(FX) 312-427-6663
(EM) amanda.roach@ladas.net
(WB) www.ladas.com

-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Monday, September 17, 2007 1:03 PM
To: amanda.roach@ladas.net
Subject: Amended Petition to Cancel
Importance: High

Dear Ms. Roach,

I am attaching an amended petition to cancel which I ask your stipulation to file. The change is in paragraph 5, simply adding an allegation of three years non-use. I believe the TTAB will grant such a motion at this stage, but would like to save everyone the trouble of a motion. Please let me know in the next few days if this is acceptable.

Also attached is the stipulated motion to extend the discovery cut-off, for your review and approval. I will file it and it will be served by email assuming you are agreeable. Thank you,

Lynn

E. Lynn Perry
Perry IP Group A.L.C.
4 Embarcadero Center - 39th Floor
San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com

www.perryip.com

EXHIBIT 4

Roach, Amanda

From: Lynn Perry [lperry@perryip.com]
Sent: Tuesday, September 18, 2007 3:54 PM
To: amanda.roach@ladas.net
Subject: Service of Consented Motion to Extend

Dear Ms. Roach,

Here is a copy, though I imagine you have already received the Board's order. Let me know when you know about the amended petition, and thank you.

If you want to discuss an informal exchange of information and/or a possible resolution, just let me know.

Regards,

E. Lynn Perry
Perry IP Group A.L.C.
4 Embarcadero Center - 39th Floor
San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

EXHIBIT

5

Roach, Amanda

From: Roach, Amanda
Sent: Thursday, November 01, 2007 4:35 PM
To: 'Lynn Perry'
Subject: RE: Supreme Oil and Fresh Express

Hello Lynn,

Funny, I was actually going to contact you about this this afternoon about an extension. I will consent to the 60 day extension of discovery until January 16th. I should hopefully have materials ready for you by month's end. I have also learned that my client would be open to amicable resolution in this matter, as originally proposed in your September 10 email. Please let me know what you need from me for the stipulation.

Amanda

-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Thursday, November 01, 2007 4:27 PM
To: amanda.roach@ladas.net
Subject: Supreme Oil and Fresh Express
Importance: High

Hello Amanda,

I see that our close of discovery is set for November 17, 2007. Would you consent to extend that to January 16 (60 days). This would give us an opportunity to review your client's evidence concerning its continued use and to discuss whether an amicable resolution of this case is possible. Let me know and thanks,

Lynn

E. Lynn Perry
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San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

EXHIBIT

6

Roach, Amanda

From: Roach, Amanda
Sent: Friday, December 28, 2007 2:17 PM
To: 'Lynn Perry'
Subject: RE: Supreme Oil and Fresh Express

Hello Lynn,

Happy New Year!

As discovery is set to close on January 16th, will you consent to a 60 day extension? I believe our discovery would then close on March 17th, as March 16th is a Sunday. I have been, unfortunately, tied up in discovery on two separate litigation matters that have now, finally, subsided for the time being.

The extension will give me the opportunity to 1) organize and review additional materials that my client wishes to forward to you, and 2) discuss our terms for settlement with my client, if you client is still interested in settlement. Please let me know.

I hope your had a wonderful holiday and will enjoy your New Year's Celebrations.

Yours sincerely,

Amanda

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224 South Michigan Avenue
Suite 1600
Chicago, Illinois 60604
(PH) 312-427-1300
(FX) 312-427-6663
(EM) amanda.roach@ladas.net
(WB) www.ladas.com

-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Thursday, November 01, 2007 5:23 PM
To: Roach, Amanda
Subject: RE: Supreme Oil and Fresh Express

I think I just need your consent, and I will serve the request for extension by email. Thanks Amanda!

Lynn

From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
Sent: Thursday, November 01, 2007 2:35 PM

EXHIBIT 7

Roach, Amanda

From: Lynn Perry [lperry@perryip.com]
Sent: Wednesday, January 02, 2008 3:01 PM
To: Roach, Amanda
Cc: Claire Mangonon
Subject: RE: Supreme Oil and Fresh Express

Happy New Year, Amanda! Yes, we will consent. You may serve by email. Thanks,

Lynn

E. Lynn Perry
Perry IP Group A.L.C.
4 Embarcadero Center - 39th Floor
San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
Sent: Friday, December 28, 2007 12:17 PM
To: Lynn Perry
Subject: RE: Supreme Oil and Fresh Express

Hello Lynn,

Happy New Year!

As discovery is set to close on January 16th, will you consent to a 60 day extension? I believe our discovery would then close on March 17th, as March 16th is a Sunday. I have been, unfortunately, tied up in discovery on two separate litigation matters that have now, finally, subsided for the time being.

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I hope your had a wonderful holiday and will enjoy your New Year's Celebrations.

Yours sincerely,

Amanda

Amanda M. Roach
Ladas & Parry LLP
224 South Michigan Avenue
Suite 1600
Chicago, Illinois 60604
(PH) 312-427-1300
(FX) 312-427-6663

EXHIBIT 8

Roach, Amanda

From: Lynn Perry [lperry@perryip.com]
Sent: Monday, February 04, 2008 6:52 PM
To: Roach, Amanda
Subject: RE: Supreme Oil and Fresh Express

Dear Amanda,

This is further to our telephone conversation on January 15, 2008. If your client would be willing to consent to Fresh Express's registration of SALAD BAR EXPRESS under the following terms, provided you can supply me with satisfactory continuing use documentation, my client would be willing to agree to drop the cancellation. Following are the necessary terms:

- Supreme Oil would amend its registration to limit the channels of trade to commercial and industrial sales;
- Fresh Express would amend its application to limit the channels of trade to retail sales;
- The parties would agree to limit their use of their marks accordingly;
- Supreme Oil would acknowledge in a side letter that Fresh Express uses its mark for salad dressings; and
- Once these changes have been made, Fresh Express would dismiss the cancellation.

If that's acceptable to your client, let me know and I can draft an agreement for your review. I look forward to hearing from you.

Regards,

Lynn

E. Lynn Perry
Perry IP Group A.L.C.
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San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
Sent: Thursday, November 01, 2007 2:35 PM
To: Lynn Perry
Subject: RE: Supreme Oil and Fresh Express

Hello Lynn,

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Amanda

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To: amanda.roach@ladas.net
Subject: Supreme Oil and Fresh Express
Importance: High

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Lynn

E. Lynn Perry
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Roach, Amanda

From: Roach, Amanda
Sent: Thursday, January 03, 2008 12:55 PM
To: 'Lynn Perry'
Subject: RE: Supreme Oil and Fresh Express

Thanks, Lynn! Will do.

Amanda

Amanda M. Roach
Ladas & Parry LLP
224 South Michigan Avenue
Suite 1600
Chicago, Illinois 60604
(PH) 312-427-1300
(FX) 312-427-6663
(EM) amanda.roach@ladas.net
(WB) www.ladas.com

-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Wednesday, January 02, 2008 3:01 PM
To: Roach, Amanda
Cc: Claire Mangonon
Subject: RE: Supreme Oil and Fresh Express

Happy New Year, Amanda! Yes, we will consent. You may serve by email. Thanks,

Lynn

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lperry@perryip.com
www.perryip.com

From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
Sent: Friday, December 28, 2007 12:17 PM
To: Lynn Perry
Subject: RE: Supreme Oil and Fresh Express

Hello Lynn,

Happy New Year!

As discovery is set to close on January 16th, will you consent to a 60 day extension? I believe our discovery would then close on March 17th, as March 16th is a Sunday. I have been, unfortunately, tied up in discovery on two separate litigation matters that have now, finally, subsided for the time being.

The extension will give me the opportunity to 1) organize and review additional materials that my client wishes to forward to you, and 2) discuss our terms for settlement with my client, if you client is still interested in settlement. Please let me know.

I hope your had a wonderful holiday and will enjoy your New Year's Celebrations.

Yours sincerely,

Amanda

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(WB) www.ladas.com

-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Thursday, November 01, 2007 5:23 PM
To: Roach, Amanda
Subject: RE: Supreme Oil and Fresh Express

I think I just need your consent, and I will serve the request for extension by email. Thanks Amanda!

Lynn

From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
Sent: Thursday, November 01, 2007 2:35 PM
To: Lynn Perry
Subject: RE: Supreme Oil and Fresh Express

Hello Lynn,

Funny, I was actually going to contact you about this this afternoon about an extension. I will consent to the 60 day extension of discovery until January 16th. I should hopefully have materials ready for you by month's end. I have also learned that my client would be open to amicable resolution in this matter, as originally proposed in your September 10 email. Please let me know what you need from me for the stipulation.

Amanda

-----Original Message-----

From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Thursday, November 01, 2007 4:27 PM
To: amanda.roach@ladas.net
Subject: Supreme Oil and Fresh Express
Importance: High

Hello Amanda,

I see that our close of discovery is set for November 17, 2007. Would you consent to extend that to January 16 (60 days). This would give us an opportunity to review your client's evidence concerning its continued use and to discuss whether an amicable resolution of this case is possible. Let me know and thanks,

Lynn

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EXHIBIT
9

Roach, Amanda

From: Roach, Amanda
Sent: Wednesday, February 06, 2008 8:38 AM
To: 'Lynn Perry'
Subject: RE: Supreme Oil and Fresh Express

Dear Lynn,

Thank you for your email. I will pass your proposal on to my client and get back to you as soon as possible.

Yours sincerely,
Amanda

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-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Monday, February 04, 2008 6:52 PM
To: Roach, Amanda
Subject: RE: Supreme Oil and Fresh Express

Dear Amanda,

This is further to our telephone conversation on January 15, 2008. If your client would be willing to consent to Fresh Express's registration of SALAD BAR EXPRESS under the following terms, provided you can supply me with satisfactory continuing use documentation, my client would be willing to agree to drop the cancellation. Following are the necessary terms:

- Supreme Oil would amend its registration to limit the channels of trade to commercial and industrial sales;
- Fresh Express would amend its application to limit the channels of trade to retail sales;
- The parties would agree to limit their use of their marks accordingly;
- Supreme Oil would acknowledge in a side letter that Fresh Express uses its mark for salad dressings; and
- Once these changes have been made, Fresh Express would dismiss the cancellation.

If that's acceptable to your client, let me know and I can draft an agreement for your review. I look forward to hearing from you.

EXHIBIT 10

Roach, Amanda

From: Meyers, Fred
Sent: Wednesday, February 06, 2008 5:32 PM
To: Roach, Amanda
Subject: RE: Re: Supreme Oil and Fresh Express

Thanks.

From: Roach, Amanda
Sent: Wednesday, February 06, 2008 5:29 PM
To: 'lperry@perryip.com'
Cc: Meyers, Fred
Subject: Re: Supreme Oil and Fresh Express

Dear Lynn,

Further to your email of yesterday, we have received use evidence from our client on the goods in class 029.

In the meantime, we will be discussing your settlement proposal with our client tomorrow and will revert as soon as possible. Please let us know if you have any questions.

Yours sincerely,

Amanda

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EXHIBIT
11

Roach, Amanda

From: Lynn Perry [lperry@perryip.com]
Sent: Thursday, February 07, 2008 7:35 PM
To: Roach, Amanda
Subject: RE: Supreme Oil and Fresh Express

Hi Amanda,

I looked at the evidence you sent but they all appear to be labels, not evidence of use of the mark over the preceding several years. Does your client have any such evidence?

Lynn

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-----Original Message-----
From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
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To: Lynn Perry
Cc: Meyers, Fred
Subject: Re: Supreme Oil and Fresh Express

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EXHIBIT 12

Roach, Amanda

From: Roach, Amanda
Sent: Tuesday, March 18, 2008 4:34 PM
To: Ehrlich, Burton
Subject: FW: Motion to Reopen

Hey Jessica -

Burt said he was going to reply to this. Just wanted to remind him.

Amanda
-----Original Message-----
From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Tuesday, March 18, 2008 2:10 PM
To: Roach, Amanda
Subject: Motion to Reopen

Hi Amanda,

I received the motion and Order from the Board in the Supreme Oil case, but I hadn't agreed to a suspension. Bert asked for a 60 day extension of the discovery period and I said I would agree to 30 days. Instead, you filed a motion to suspend for 30 days, which puts the discovery close well off into the future. Hopefully, it was just a misunderstanding, but I've filed a motion to reopen (copy attached).

In the motion I mention (because Bert seemed surprised) that, for months now, I had granted no extensions to answer the outstanding discovery requests - only extensions to the discovery deadline. I figured your client hasn't produced because it doesn't have the evidence to rebut the statements of abandonment in the Petition to Cancel. The undated 7 labels you sent me do not by themselves prove continuing use.

If you have the evidence, it is imperative that you share it. Otherwise, my client is reluctant to agree to the limitations on use your client wants to impose. I tried to explain this to Bert, and I hope and trust you understand our position. We remain open to suggestions to resolve this case, but I do feel we need to move it along, after the passage of so much time.

Sincerely,

Lynn

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EXHIBIT
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